Filed 12/1/16 P. v. Vaidehi CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. VAIDEHI, INC., Defendant and Appellant.	B264963 (Los Angeles County Super. Ct. No. BC557891)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rolf M. Treu, Judge. Affirmed.

Frank A. Weiser for Defendant and Appellant.

Michael N. Feuer, City Attorney, and Gregory P. Orland, Senior Counsel, for Plaintiff and Respondent.

This case arises out of the People's complaint for nuisance abatement and related relief. The complaint alleged violations of sections 11570 et seq. of the Health & Safety Code, 3480 et seq. of the Civil Code, and 17200 of the Business and Professions Code. The complaint sought closure of the Bronco Motel in Los Angeles. It alleged multiple and prolonged illegal activity at the motel, including violent crime and violations of narcotics, firearm and prostitution statutes. The trial court granted the People's motion for summary judgment and issued judgment accordingly. Appellant Vaidehi, Inc. appeals from that judgment, claiming deficiencies in service of the notice of motion for summary judgment and other procedural errors, and on the merits. We find no abuse of discretion or other error in the trial court's rulings, and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

The underlying action was commenced by a complaint filed on September 17, 2014. Appellant filed an answer on November 6, 2014. That pleading consisted of a general denial of almost all of the charging allegations and 21 affirmative defenses. In its Case Management Order of December 17, 2014, the trial court noted that jury trial was waived, and set the case for trial to be held on August 10, 2015.

Nothing further appears in the record until March 6, 2015, when the People filed a motion for summary judgment. Besides points and authorities, the motion attached some 670

pages of supporting documents in which evidence detailing criminal activity at the motel and related material was set out.

Appellant's opposition to the summary judgment motion was filed on May 7, 2015. The opposition consists entirely of argument, supported by a declaration of counsel and material from a United States Supreme Court proceeding in which he was involved. The argument does not challenge the sufficiency of evidence to support summary judgment, but does challenge the timeliness of the service of the motion for summary judgment, argues that the materials received by appellant's counsel did not include the notice of motion, and, as an alternative to a ruling on the merits, seeks a continuance for discovery. The opposition is supported by a declaration by Frank A. Weiser, counsel for appellant. The opposition neither attacks nor concedes the sufficiency of supporting material for the summary judgment motion.

Following the trial court's ruling granting summary judgment, appellant filed an ex parte application for leave to file supplemental opposition relating to penalties. The motion was opposed, and was denied. The final judgment granted a permanent injunction and awarded attorney fees, costs, and monetary civil penalties. It was issued on June 15, 2016. This appeal followed.

DISCUSSION

I

Appellant's counsel argues the motion for summary judgment was not served within the time requirements of the statute. The statute requires that notice of the motion and supporting papers be served "at least 75 days before the time appointed for hearing." (Code of Civ. Proc., § 437c, subd. (a).) (The time is extended where service is by mail, to an out-of-state address, by fax or electronically, or in specified other ways, circumstances not at issue in this case.)

Since the summary judgment hearing was noticed for May 21, 2015, the 75-day period, by itself, would require service of the moving papers on or before March 6 of that year. Code of Civil Procedure section 1011, subdivision (a), provides that when service is made by serving counsel of record, it may be accomplished by leaving the material served "between the hours of nine in the morning and five in the afternoon, in a conspicuous place in the office, or, if the attorney's office is not open so as to admit of that service, then service may be made by leaving the notice or papers at the attorney's residence."

Service was made by Claudia de la Rosa, a paralegal in the office of the Los Angeles City Attorney, counsel for respondent. In her declaration Ms. de la Rosa states that she regularly and personally serves defendants with summary judgment materials, and that on March 6, 2015 (a Friday), at approximately 1:45 p.m., she arrived at Mr. Weiser's office to personally serve the summary judgment moving papers.

Upon arrival there she "attempted to open the Office door to personally serve Mr. Weiser." The door was locked and did not have a mail slot. She knocked on the door but there was no response. She then leaned the package containing these documents against the office door and proceeded to each of two neighboring offices on the same floor. She did so to inquire if persons at those offices received packages on Mr. Weiser's behalf when he was away. Both persons with whom she spoke said they did not, but that Mr. Weiser often receives packages left outside his office door. She left the package where it was and left the building.

Additional evidence was provided by Mr. Weiser in his declaration. In it he declared that he is a sole practitioner; that his office is at the address where the package was left and no one has else has access to it without his consent, except the building office. He stated that he was not in the office on March 6, 2015, as he had been in Washington, D.C., in connection with a case being argued before the United States Supreme Court. He declared that "[o]n March 6, 2015 while I was out of my office, I received an e-mail from" Steven Gold, an attorney in the City of Los Angeles Office of City Attorney. In it, Mr. Gold stated that he had just served a summary judgment motion at Mr. Weiser's office and was attaching a courtesy copy of the notice, motion, and points and authorities. Mr. Weiser declared that he went to his office on Sunday, March 8, 2015, and found the package inside his office on a couch. "It was apparently the MSJ [motion for summary judgment] papers that Mr. Gold referred

to in his e-mail to me of March 6, 2015 that he stated was served at my office that day." Based on his "extensive past experience with the people who work in the building for the management, Central Plaza, over approximately the last 7 years at my law office . . . the practice and custom of the cleaning crew is that if a package is left at my law office front door, the cleaning crew will place the package on my office couch next to the front door." Thus, "given that there was no one in authority to directly serve the package in my office, I believe that the package was dropped off at my front door and placed on my couch by the cleaning crew."

Ms. de la Rosa did not provide details about the contents of the package left at the office door of appellant's counsel. That information was supplied in a declaration by Maria Gonzalez, a secretary at the office of the Los Angeles City Attorney. In it she declared that she regularly receives documents from attorneys and prepares them for service, including, in particular, motions for summary judgment. On March 6, 2015, attorney Gold provided her with the summary judgment documents in this case, for filing and personal service. They included the "MPAs," a term she defined as the "Notice of Motion and Motion; Memorandum of Points and Authorities," which are "of particular importance as it contains Plaintiff's brief in support of the motion." She stated that she "never, to my knowledge, failed to include the MPAs in a packet of documents that I have prepared for service." She knows this material was included in the service package she prepared because she made a working copy for the office

and reviewed it before preparing her declaration. While she does not have a specific recollection of placing the moving papers in the envelope that went out for service, based on the foregoing she believes they included the points and authorities and notice of motion.

While the summary judgment papers were left at the door of counsel's office, rather than "in" the office, the evidence supports the inference they were taken into the office (by the cleaning crew) on the day they were left at Mr. Weiser's office door.

Read together, the declarations of Ms. de la Rosa, Ms. Gonzalez and Mr. Weiser establish that service was accomplished on March 6, 2015, which was 75 days before the date noticed for the summary judgment hearing. In addition, Mr. Weiser received the courtesy copy of these materials emailed to him by Mr. Gold.

Respondent argues that even if it were otherwise meritorious, the claim of defective service should be rejected in this case, for two reasons.

The first is that, in opposition, appellant's counsel did not confine himself to the timeliness of service issue but also argued on the merits. Case authority is divided on whether an objection to service is waived (or forfeited) by argument on the merits at the summary judgment hearing. There is authority supporting respondent's position that it is waived. (See *Tate v. Superior Court* (1975) 45 Cal.App.3d 925, 930, and cases cited; *Carlton v. Quint* (2000) 77 Cal.App.4th 690, 697-698 [noting the "dilemma" faced by counsel in this

situation, and suggesting that counsel seek a continuance if the service argument is rejected]; *Robinson v. Woods* (2008) 168 Cal.App.4th 1258, 1267 [also noting the dilemma and citing a suggestion in Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) ¶¶ 9:96 to 9.96.1 [now at 9.101.1-102], p. 9(I)-69); and see *Urshan v. Musicians' Credit Union* (2004) 120 Cal.App.4th 758, 764 [trial court not authorized to shorten time for summary judgment hearing]; *Boyle v. CertainTeed* (2006) 137 Cal.App.4th 645, 653–654 [local rule not effective because of conflict with section 437c].)

We need not resolve this issue since, as we have stated, there was proper service within the statutory period, and as explained below, any violation was not prejudicial.

Respondent's second argument has merit: there was no prejudice. "In order to obtain a reversal based upon such a procedural flaw, the appellant must demonstrate not only that the notice was defective, but that he or she was *prejudiced*." (*Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1289 and cases cited; and see *Southern California Gas Co. v. Flannery* (2014) 232 Cal.App.4th 477, 491; Code of Civ. Proc., § 475 [cited in *Flannery*; at every stage of action court must disregard any error or defect in pleadings or proceedings which, in its opinion, does not affect substantial rights of the parties].)

Here, appellant suffered no resulting prejudice. He asserted none below. At oral argument, the trial court asked him to state any prejudice sustained by his client from the

alleged delay of service and noted that "the court has asked the question [about resulting prejudice] twice, has not received a response twice, so the court must presume that you have no facts upon which to base any contention, if you have the contention, that there is prejudice to you by the two-day delay."

We conclude there is no basis to reverse the order granting summary judgment on the ground of untimeliness.

II

Appellant also argues that service of the motion was defective because the material served omitted the notice of motion for summary judgment. The short answer to this claim is that the Proof of Service filed with the summary judgment materials includes a declaration by Ms. de la Rosa that she served the Notice of Motion for Summary Judgment or in the Alternative, Summary Adjudication; Points and Authorities." According to her declaration, the materials she delivered to Mr. Weiser's office were given to her by Ms. Gonzalez, Mr. Gold's secretary. And Ms. Gonzalez's declaration, also before the trial court, established that it was her custom and practice to include the notice of motion in the packet of materials she prepared for service of a summary judgment motion. To the extent there is a discrepancy in the evidence before the trial court, that court implicitly resolved the issue by its ruling that the notice was included in the documents served. And, Mr. Weiser was aware of the motion: he filed an opposition and appeared at the hearing when the

motion was argued. He certainly knew that respondent was moving for summary judgment, and the basis for the motion.

We conclude that no showing has been made on appeal to justify reversing the ruling on the basis of an omission of an essential document from the material served.

III

Appellant also argues that it "need not show substantive prejudice although the prejudice is in one sense 'absolute' as appellant was deprived of its property interest to 75 day notice" under Code of Civil Procedure section 437c, subdivision (a). The logic of this claim is difficult to follow. Appellant argues that it has a property right to conduct its motel business, and the government was not entitled to deprive it of that interest in violation of its constitutional due process rights. But respondent was entitled to seek closure of the business on proof that the business, as conducted, constituted a public nuisance subject to abatement after proper notice and opportunity to be heard in a court of law. Appellant supports its claim with a discussion of Fourth Amendment search and seizure cases. This case does not present issues of illegal search. Instead, it was respondent's burden to convince the trial court that the motel, as operated by appellant, constituted a public nuisance subject to abatement as provided by law. With a single exception which we next note, appellant does not discuss the detailed merits showing made in respondent's moving papers, and it presented no opposition on the merits.

The exception concerns a license. Appellant acknowledges that respondent "submitted an undisputed material fact that the appellant was both the owner and operator of the motel." But, it argues, there was no evidence that "appellant is the licensed operator of the motel. . . . Conspicuously missing is the City of L.A., business license for the motel which is in the possession of the respondent." Appellant acknowledges "that appellant is the owner of the property [motel] since 2002" but argues that respondent did not plead that appellant was the operator of the property at any time, let alone from 2011 to 2015. Thus, it claims, respondent did not establish that "appellant is the operator of the motel and did not establish the element that it was 'directly or indirectly maintaining or permitting the nuisance.'" (Citing Health & Saf. Code, § 11571.) As a result, it argues, since there was an insufficient showing for the abatement order no defense was required.

The absence of a city license to operate the motel is hardly a basis to defeat the trial court's abatement order. No doubt lack of a license may be a basis for action by the city—indeed, it may be a further basis for seeking closure of the business or other curative action—but it hardly is a defense to the City's suit in this case. More fundamentally, the City pleaded and proved that at the time abatement was sought, appellant was operating the motel—which was being "used" by appellant in a manner that created the nuisance to be abated. That is a sufficient prima facie showing. (See *People ex rel. Trutanich v. Joseph* (2012) 204 Cal.App.4th 1512.)

IV

In the trial court appellant asked that if the court did not deny the motion for summary judgment, it continue the hearing so that appellant could conduct discovery. On appeal appellant argues that the trial court erred in denying that alternative relief.

That claim lacks merit because appellant failed to demonstrate diligence in seeking discovery. Appellant's counsel argued that on March 6, 2015, he was "attending to other business after returning in the evening of March 3, 2015 from Washington, D.C. in a case heard in the United States Supreme Court . . . ." In *City of Los Angeles v. Patel* (2015) 135 S.Ct. 2443, which was argued on March 3, 2015, the Supreme Court affirmed a Ninth Circuit ruling in favor of counsel's client (*Patel v. City of Los Angeles* (9th Cir. 2013) 738 F.3d 1058).[1] Mr. Weiser argued that he is a sole practitioner, and that most of his practice "came to a halt because of [that] case in the Supreme Court." He also refers to illnesses suffered by his wife and himself. This does not explain the failure to undertake any discovery during the four-month period between the filing of appellant's answer to the complaint (November 6, 2014) and the filing of the motion for summary judgment (March 6, 2015), and particularly after

[1] Mr. Weiser also was involved in a case before the Ninth Circuit, *Patel v. City of Montclair* (2015) 798 F.3d 895, in which a petition for certiorari was denied on March 28, 2016.

the case management conference in December 2014. Since this is a case in which the City was seeking injunctive relief because of an ongoing public nuisance, the trial court was within its discretion in concluding that appellant failed to exercise reasonable diligence. Indeed, once the trial date was set, there is no showing that appellant exercised any diligence at all.

The court did not abuse its discretion in declining to postpone the summary adjudication.

V

Finally, appellant argues the trial court erred with respect to "several salient errors in the issuance and scope" of the injunction. Those listed concern the installation and maintenance of a gate and video system at the driveway entrance of the motel, the duration of the injunction (ten years) and the provision that material violations of the injunction "shall" result in closing of the motel for one year. Respondent points out that appellant failed to argue any of these issues before the trial court, but, instead, objected only to monetary issues in the trial court's proposed judgment. That appears to be the case. No trial court error is shown.

DISPOSITION

The judgment is affirmed. Respondent is entitled to its costs on appeal.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

COLLINS, J.